pending before the District Court. Counsel for Petitioner, Cotler Drugs, Inc., were formerly members of the Committee of Counsel. Counsel for Petitioner, Louis Patlogan, was never a member of the Committee.

QUESTIONS PRESENTED.

1. Does a settlement context, in which the resolution of legal issues is consciously avoided, provide an appropriate basis for review and ultimate determination of such legal issues by this Court?

2. Is there any basis upon which this Court could find a "clear abuse" by the Courts below of their respective discretions?

STATEMENT OF THE CASE.

The history of these proceedings is fully set forth in the opinions of the two lower Courts which appear in the Appendices accompanying the Petition filed with this Court. The statements of fact and findings therein are expressly adopted and incorporated herein as Respondents' statement of the case.

ARGUMENT.

I. A SETTLEMENT CONTEXT IS INAPPROPRIATE FOR THE DETERMINATION OF COMPLEX AND DIFFICULT LEGAL ISSUES.

A. The Courts Below Consciously and Properly Avoided the Precise Resolution of Legal Issues.

Petitioners' brief characterizes the decisions rendered below as establishing broad new legal doctrines which, they say, are dramatically inconsistent with virtually every settled rule of law in the antitrust field. Having erected this enviable target, Petitioners proceed to outline in detail conflicts with prior decisions of this Court, numerous inconsistencies with the decisions of other District Courts and Courts of Appeals and a veritable epidemic of confusion throughout the land. In point of fact, Petitioners' concern in this regard is unfounded.

What the District Court did in this case, with the subsequent approval of the Court of Appeals, was to render a severely limited decision. The District Court followed precisely the standards which this Court and other courts have set forth for the proper resolution of legal issues: it expressly avoided "the determination of 'sharply contested and dubious issues'" as required by such cases as *In re Prudence, Inc.*, 98 F. 2d 559 (2d Cir. 1938) and *Glicken* v. *Bradford*, 35 F. R. D. 144 (S. D. N. Y. 1964). Judge Wyatt, in his opinion below, emphasized the necessity of adopting this course of action. He said:

> "There is a further important principle to be observed in respect of judicial consideration of proposed settlements. This is that the judge does not try out or attempt to decide the merits of the controversy. 'Any

> virtue which may reside in a compromise is based on doing away with the effect of such a decision.' " (314 F. Supp. at 741, Petitioners' Appendix, No. I, p. 70.)

This is not, of course, to suggest that the *proper* consideration was not given to the various legal issues. The District Court adopted and applied the standards promulgated by this Court in *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson*, 390 U. S. 414 (1968). Judge Wyatt noted:

> "The Supreme Court directs the judge to reach 'an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated' and to 'form an educated estimate of the complexity, expense and likely duration of such litigation, * * * and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise' " (314 F. Supp. at 740-741, Petitioners' Appendix, No. I, p. 69.)

No concrete decisions on the legal validity of various theories were made. No attempt was made in this deliberately limited inquiry to define the precise boundaries of the *Hanover Shoe* decision nor to articulate the varied aspects of the standing to sue question with a view toward announcing settled principles of law. An educated estimate was what was required and is what was made.

The Court of Appeals said:

> "It is important to take particular note of the fact that in reviewing the compromise, this court need not and should not reach any dispositive conclusions on the admittedly unsettled legal issues which the case raises, yet at the same time we are apparently required to attempt to arrive at some evaluation of the points of law on which the settlement is based." (Petitioners' Appendix, No. II, p. 11.)

The Court of Appeals made this evaluation and concluded that the District Court acted entirely properly and within its discretion.

In view of the deliberate efforts of both of the lower Courts to avoid decisions of legal issues, Petitioners' repeated assertions that such decisions were in fact made are simply incorrect. It is manifestly unreasonable to attempt, as Petitioners now do, to attach broad import to rulings which are plainly limited in scope.

B. The Legal Issues Which Petitioners Raise Are Not Appropriate for Adjudication in This Case.

This Court has often stated its reluctance to treat with matters not properly presented by the decisions and record below. A settlement by its very nature is an often ill-defined amalgam of considerations—both legal and practical—leading to an ultimate decision based heavily on the discretion of the District Judge. The benefits of briefing and advocacy looking towards the resolution of precise legal issues are neither sought nor obtained in a settlement context. Here Petitioners bring to this Court wide-ranging, ill-defined issues of considerable consequence and ask this Court to review and decide anew issues of fact, matters of discretion, and questions of law. The answer to Petitioners' request is suggested by this Court's action in *Maryland* v. *Baltimore Radio Show, Inc., et al.*, 338 U. S. 912 (1950) where, in explaining this Court's denial of a Writ of Certiorari, Justice Frankfurter stated:

> "A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening." (338 U. S. at 918.)

More appropriate opportunities will present themselves in other cases in which the legal questions involved only tangentially in this settlement may be directly presented.

II. THE COURTS BELOW ACTED ENTIRELY WITHIN THE SCOPE OF THEIR DISCRETION IN APPROVING THE PROPOSED SETTLEMENT AS FAIR, ADEQUATE AND REASONABLE.

To succeed here, Petitioners would have to demonstrate that the Court of Appeals has so far departed from the accepted and usual course of judicial proceeding, or so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision. (Rule 19 of the Rules of this Court.) The standard of review stated in *Connecticut Ry. & Lighting Co.* v. *New York, N. H. & H. R. Co.*, 190 F. 2d 305 (2nd Cir. 1951) is applicable here. The Court stated in that case that:

> "It is well settled that the approval of a compromise is a discretionary order which can be reversed only upon a clear showing of an abuse of discretion." (190 F. 2d at 308.)

The measure of the District Court's discretion in making pre-trial determinations was stated in *City of New York* v. *International Pipe and Ceramics Corp.*, 410 F. 2d 295 (2d Cir. 1969), where the Court said:

> "In resolving these countervailing situations, the judgment of the trial judge should be given the greatest respect and the broadest discretion particularly if, as here, he has canvassed the factual aspects of the litigation." (410 F. 2d at 298.)

And, the ability of the Court to circumscribe the proceedings in a manner best suited to inform itself of those matters relevant to its decision is well established. Thus, in *Glicken* v. *Bradford*, 35 F. R. D. 144 (S. D. N. Y. 1964), the Court said:

> ". . . it is within the Court's discretion to limit the proceedings to whatever is necessary to aid it in reaching an informed, just and reasoned decision." (35 F. R. D. at 148.)

In fact, in meeting the very same contentions raised in this Court by Petitioners, Judge Wyatt, in his opinion below, stated the basic reason for their rejection. He said:

> "The few opposing members of the wholesaler-retailer class are critical of many of the procedural steps taken by the Court. Their criticisms need not be examined in detail. They all concern the orientation of the procedure toward settlement administration rather than toward discovery, decision of law points, and the like. This orientation was deliberately chosen in order to determine which class members wished to settle and which class members wished to litigate. All members were given an option to exclude themselves from their class." (314 F. Supp. at 745, Petitioners' Appendix, No. I, pp. 78-9.)

As in *Masterson* v. *Pergament*, 203 F. 2d 315 (6th Cir.), *cert. denied*, 346 U. S. 832 (1953):

> "The District Judge was, therefore, a third party to the compromise. There is no contention and there could be none, that in approving the compromise important information was concealed from him or that his participation in the settlement was subject to any infirmity. Every possible aspect of opposition was fully by him explored. In any event, he ruled against the objectors upon these matters upon the consideration of substantial evidence and in the exercise of a sound judicial discretion." (203 F. 2d at 330-331.)

In the instant case, all of the proper criteria were employed by the District Court in testing this proposed settlement. Full consideration was given to every matter raised by all of the parties below. In the sound exercise of its broad discretion, the District Court approved the settlement. There is here no departure from the accepted and usual course of judicial proceedings, but rather an instance of painstaking adherence to each and every requirement at each step in order to assure the full protection of the rights of all parties.

Similarly, there is no basis on which the decision of the Court of Appeals may be viewed as an abuse of discretion. The Court of Appeals properly reviewed the District Court opinion with a view toward intervention only upon a clear showing of abuse of discretion. (Petitioners' Appendix, No. II, pp. 10-11) Each of the contentions made on appeal was weighed by the Court in reaching its conclusion affirming the District Court. And, the Court determined that certain of the Appellants' claims—raised again in this Court—were entirely without substance. As to Petitioners' fear that private rights of action will be destroyed, the Court of Appeals' own answer is the most succinct. The Court said:

> "Secondly, to permit the use of the doctrine [*Hanover*] in the present circumstances will not act to limit or frustrate private treble-damage claims, but will, if anything, do the opposite." (Petitioners' Appendix, No. II, p. 16)

The Petitioners have offered no basis upon which this Court should issue a Writ of Certiorari.

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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